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DEPARTMENT OF COMMERCE
International Trade Administration
[C-570-980]

Countervailing Duty Investigation of Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China: Preliminary Determination of Critical Circumstances

AGENCY: Import Administration, International Trade Administration, Department of Commerce

SUMMARY: On October 19, 2011, the Department of Commerce (Department) received a countervailing duty (CVD) petition concerning imports of crystalline silicon photovoltaic cells, whether or not assembled into modules (solar cells), from the People's Republic of China (PRC), filed in proper form by SolarWorld Industries America Inc. (Petitioner).¹ The petition included a timely allegation, pursuant to section 703(e)(1) of the Tariff Act of 1930, as amended (the Act), and 19 CFR 351.206, that critical circumstances exist with respect to imports of the merchandise under investigation. In accordance with section 703(e)(1) of the Act, because Petitioner submitted its critical circumstances allegation more than 20 days before the scheduled date of the preliminary determination, the Department must promptly issue a preliminary critical circumstances determination.² Based on information provided by Petitioner and the data placed on the record of this investigation by the mandatory respondents, Wuxi Suntech Power Co., Ltd. (Suntech) and Changzhou Trina Solar Energy Co., Ltd. (Trina) (collectively, respondents), the Department preliminarily determines that critical circumstances exist for imports of solar cells from the PRC for Suntech, Trina, and all other producers or exporters.

¹ See Petition for the Imposition of Antidumping and Countervailing Duties Against Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China, dated October 19, 2011 (Petition).

² An allegation of critical circumstances was also included with the antidumping duty (AD) petition. However, the statute establishes an earlier due date for a CVD preliminary determination than for an AD determination. As such, a critical circumstances determination in the AD proceeding will be issued subsequent to this determination.

EFFECTIVE DATE: (Insert date of publication in the Federal Register.)

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SUPPLEMENTARY INFORMATION

Background

On November 8, 2011, the Department initiated a CVD investigation of solar cells from the PRC.³ In the Initiation Notice, the Department stated that, if the criteria for a finding of critical circumstances are established, we would issue a critical circumstances finding at the earliest possible date.⁴ Section 703(e)(1) of the Act provides that the Department will preliminarily determine that critical circumstances exist if there is a reasonable basis to believe or suspect: (A) that “the alleged countervailable subsidy” is inconsistent with the Subsidies and Countervailing Measures (SCM) Agreement of the World Trade Organization, and (B) that there have been massive imports of the subject merchandise over a relatively short period. To determine whether imports of the subject merchandise under investigation have been “massive,” 19 CFR 351.206(h)(1) provides that the Department normally will examine: (i) the volume and value of the imports; (ii) seasonal trends; and (iii) the share of domestic consumption accounted for by the imports. In addition, 19 CFR 351.206(h)(2) provides that imports must increase by at least 15 percent during the “relatively short period” to be considered “massive.” A “relatively short period” is defined in the regulations as normally being the period beginning on the date the

³ See Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People’s Republic of China: Initiation of Countervailing Duty Investigation, 76 FR 70966 (November 16, 2011) (Initiation Notice).

⁴ See id. at 70969.

proceeding begins (i.e., the date the petition is filed) and ending at least three months later.⁵ The regulations also provide, however, that, if the Department finds that importers, or exporters or producers had reason to believe, at some time prior to the beginning of the proceeding, that a proceeding was likely, the Department may consider a period of not less than three months from that earlier time.⁶

In determining whether the above statutory and regulatory criteria have been satisfied, we examined the evidence presented in the October 19, 2011 petition, comments from both Petitioner and Suntech,⁷ and the respondents' shipment volume submissions.⁸

Alleged Countervailable Subsidy is Inconsistent with the Subsidies Agreement

To determine whether an alleged countervailable subsidy is inconsistent with the SCM Agreement, in accordance with section 703(e)(1)(A) of the Act, the Department considered the evidence currently on the record of this investigation. Specifically, the petition included allegations, supported by factual information reasonably available to Petitioner, that the following export subsidy programs were available to solar cell producers: Export Product Research and Development Fund; Subsidies for Development of "Famous Brands" and "China World Top Brands;" Sub-Central Government Subsidies for Development of "Famous Brands" and "China World Top Brands;" Funds for Outward Expansion of Industries in Guangdong

⁵ See 19 CFR 351.206(i).

⁶ Id.

⁷ See letter from Suntech, "Crystalline Photovoltaic Cells, Whether or Not Assembled into Modules, from the People's Republic of China: Opposition to Petitioner's Request for a Critical Circumstances Inquiry," November 28, 2011, and letter from SolarWorld, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic Of China: Petitioner's Critical Circumstances Rebuttal Comments," December 8, 2011.

⁸ The Department requested that both mandatory respondents provide data on monthly quantity and value of shipments to the United States, to be updated within two weeks after the end of each month up until a preliminary determination is issued. We requested that the respondents report quantity in terms of solar cells, solar modules, and watts. See Memorandum to the File, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, From the People's Republic of China: Request for Critical Circumstances Information," December 15, 2011.

Province; Income Tax Reductions for Export-Oriented FIEs; Tax Refunds for Reinvestment of FIE Profits in Export-Oriented Enterprises; Export Credit Subsidy Programs; and Export Guarantees and Insurance for Green Technology. In addition, the petition included allegations that two import substitution programs were provided to solar cell producers: Tax Reductions for FIEs Purchasing Chinese-Made Equipment and VAT Rebates on FIE Purchases of Chinese-Made Equipment. The Department has determined in previous CVD investigations of imports from the PRC that a number of these programs constitute export subsidies and import substitution subsidies.⁹

Based on the record evidence available to the Department at this time, the Department has a reasonable basis to believe or suspect that the subsidy allegations identified above are inconsistent with the SCM Agreement.

Massive Imports

In determining whether there are “massive imports” over a “relatively short period,” pursuant to section 703(e)(1)(B) of the Act, the Department normally compares the import volumes of the subject merchandise for at least three months immediately preceding the filing of the petition (*i.e.*, the “base period”) to a comparable period of at least three months following the filing of the petition (*i.e.*, the “comparison period”). Imports normally will be considered massive when imports during the comparison period have increased by 15 percent or more compared to imports during the base period.

⁹ See, *e.g.*, Aluminum Extrusions From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 76 FR 18521 (April 4, 2011); Certain Coated Paper Suitable for High-Quality Print Graphics Using Sheet-Fed Presses From the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 75 FR 59212 (September 27, 2010); Certain Kitchen Shelving and Racks from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 74 FR 37012 (July 27, 2009); Coated Free Sheet Paper from the People’s Republic of China: Final Affirmative Countervailing Duty Determination, 72 FR 60645 (October 25, 2007).

Based on evidence provided by Petitioner, the Department finds that pursuant to 19 CFR 351.206(i), importers, exporters or producers had reason to believe, at some time prior to the filing of the petition, that a proceeding was likely. Specifically, the Department concludes that the available factual information provided by Petitioner indicates that importers, exporters or producers had reason to believe that a proceeding was likely during September 2011.

The petition included factual information from August 24, 2009, through October 11, 2011. The factual information included commentary about the closing and/or bankruptcy of U.S. solar cell companies, articles discussing subsidies given to Chinese solar cell producers in the PRC, and articles concerning actions being taken by the U.S. Trade Representative. However, it is not until September 2011 that the information submitted explicitly refers to AD and CVD remedies.¹⁰ Given the factual information in the petition, we find that knowledge was imputed to importers, exporters or producers during September 2011.

In analyzing whether there have been massive imports, the Department typically determines whether to include a month in the base or comparison period depending on whether the prior notice took place in the first or second half of the month. However, in this case, regardless of whether knowledge was imputed to importers, exporters or producers in the first or second half of September 2011, we find that imports have been massive over a relatively short period of time. First, the Department compared imports during a base period of May through August 2011 to imports from September through December 2011 (assuming knowledge was imputed in early September, putting that month into the comparison period). Second, we compared imports during a July through September 2011 base period to imports from October

¹⁰ See, e.g., Petition at Volume IV, exhibit 13 (an article by Bloomberg, dated September 8, 2011) and exhibit 16 (an article by Bloomberg, dated September 28, 2011).

through December 2011 (assuming knowledge was imputed in late September, putting that month into the base period).

According to the monthly shipment information provided by the respondents, the volume of shipments of solar cells to the United States increased by substantially more than 15 percent for Suntech and Trina, regardless of which of these two base and comparison periods we examined.¹¹ The data provided by the two respondents is business proprietary information (BPI), and, therefore, the exact figures are included in a separate, BPI memorandum.¹²

In determining if U.S. shipments from all other producers or exporters were massive, we relied on the experience of the mandatory respondents. We did not rely on data from the ITC to determine if critical circumstances existed for all other producers or exporters. After examining the ITC data for Harmonized Tariff Schedule of the United States numbers 8541.40.6020 (solar cells assembled into modules or panels) and 8541.40.6030 (solar cells, not assembled into modules or made up into panels) for the time period of June to November 2011, we found that the reported quantity amount is not uniform because it includes both modules and cells in its calculation of quantity. Therefore, based on the experience of the respondents, we find that shipments by all other producers or exporters also increased by more than 15 percent.

Conclusion

In summary, in accordance with section 703(e)(1) of the Act, we find that there is a reasonable basis to believe or suspect that certain subsidy allegations under investigation are inconsistent with the SCM Agreement, and we find that there have been massive imports of solar cells over a relatively short period from Suntech, Trina, and all other producers or exporters.

¹¹ At the Department's request, the respondents provided three measures of quantity (modules, cells, and wattage). The increase is more than 15 percent regardless of which quantity figure is used.

¹² See Memorandum to The File, from Jun Jack Zhao, "Crystalline Silicon Photovoltaic Cells, Whether or Not Assembled Into Modules, from the People's Republic of China – Monthly Shipment Q&V Analysis for Critical Circumstances" (Preliminary Critical Circumstances Memorandum), dated concurrently with this notice.

Given the analysis summarized above, and described in more detail in the Preliminary Critical Circumstances Memorandum, we preliminarily determine that critical circumstances exist with respect to imports of solar cells from the PRC for Suntech, Trina, and all other producers or exporters.¹³

Final Critical Circumstances Determination

We will make a final determination concerning critical circumstances for solar cells from the PRC when we make our final determination in this CVD investigation. All interested parties will have the opportunity to address this determination further in case briefs to be submitted after completion of the preliminary subsidies determination.

ITC Notification

In accordance with section 703(f) of the Act, we have notified the ITC of our determination.

Suspension of Liquidation

In accordance with section 703(e)(2) of the Act, because we have preliminarily found that critical circumstances exist with regard to imports exported by Suntech, Trina and all other producers or exporters, if we make an affirmative preliminary determination that countervailable subsidies have been provided to respondents at above de minimis rates,¹⁴ we will instruct U.S. Customs and Border Protection (CBP) to suspend liquidation of all entries of solar cells from the PRC, as described in the “Scope of Investigation” section of the Initiation Notice,¹⁵ that are entered, or withdrawn from warehouse, for consumption on or after the date that is 90 days prior to the effective date of “provisional measures” (e.g., the date of publication in the Federal

¹³ See Preliminary Critical Circumstances Memorandum.

¹⁴ The preliminary determination concerning the provision of countervailable subsidies is currently scheduled for February 13, 2012.

¹⁵ See Initiation Notice, 76 FR at 70969; see also Appendix 1.

Register of the notice of an affirmative preliminary determination that countervailable subsidies have been provided to respondents at above de minimis rates).

At such time, we will also instruct CBP to require a cash deposit or the posting of a bond equal to the estimated preliminary subsidy rates reflected in the preliminary subsidies determination published in the Federal Register. This suspension of liquidation will remain in effect until further notice.

This notice is issued and published pursuant to section 777(i) of the Act.

Paul Piquado
Assistant Secretary
for Import Administration

____ January 27, 2012 ____
Date

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